and therefore lacked the capacity to remarry. When it came time for preparing instructions to the jury, however, he offered an instruction, No. 22, which had a place in the case only if the jury were being asked to consider whether Munio and Maria had been validly divorced. That instruction, as given, read: "The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void" (R. 339 and 351).

In the Court of Appeals the Government at one point asserted that "a review of the entire record reveals that at no time did the government assert the bigamous marriage theory" (Answer to Pet. for Rehearing, p. 15), and at another that the purpose of Instruction No. 22 "was not meant to relate to a bigamous situation *only*" (emphasis added) (Answer to Pet. for Rehearing, p. 17). That word "only" amounts to a complete, though unintentional, disclosure.

The Court of Appeals conceded that whether or not Maria had been legally divorced from Munio Knoll was not determinable from the record (R. 393). Yet now the Government, in resisting the Petition for a Writ of Certiorari, apparently embraces the bigamous marriage theory which the prosecutor would not admit to, despite his offer of Instruction No. 22, and which the Government in the Court of Appeals expressly disclaimed. Thus the Government now asserts: "The second witness, Maria, had testified to an earlier marriage with Munio Knoll, and both her testimony and that of Munio Knoll adduced a rabbinical divorce in 1942 or 1943 of such questionable validity, and a record of such extensive living together with Knoll subsequent to his ceremony with Osborne, as raised serious question whether Knoll had ever obtained a valid divorce from Maria and was even free to enter into a second marriage (Gov't Bf., p. 24).

Parenthetically, it is worth noting that in making this assertion the Government claims that Maria's testimony "adduced a rabbinical divorce," notwithstanding the fact that the prosecutor deliberately avoided the subject on direct-examination and prevented cross-examination with respect to it.

This review of the Government's off-again, on-again handling of an obviously significant issue serves to highlight the claim that Munio expressly waived his privilege to object to Maria's testimony against him (Gov't Bf., pp. 5 and 24). To be sure, at one point Munio Knoll's counsel stated that he did not wish to take advantage of the objection to Maria's competence (R. 52). The following morning, however, before Maria testified, counsel endeavored to indicate to the court the quandry in which his client was placed, an effort which the trial court cut off with a curt "Oh, objection overruled;" counsel promptly noted an "Exception" (R. 56-57). The circumstances of this exchange, put in the full context of the Government's ambivalent attitude toward the "bigamous marriage theory" as it related to Munio and Maria, hardly justify the assertion that Munio expressly waived his privilege. On the contrary, since the Government in this Court wishes to take full advantage of what facts there are as to the "questionable validity" of the rabbinical divorce, the record ought not be read as showing a waiver.

In the absence of waiver, of course, Maria was competent to testify against Munio only if wives generally are competent to testify against husbands in criminal cases, for, since Maria's marriage to Munio was not controverted, the Court of Appeals' alternative position is inapplicable. This means, necessarily, that the broad question of competence is posed for decision.

3. The Government endeavors to distinguish *Miles* v.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 66

MARCEL MAX LUTWAK, MUNIO KNOL, AND REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' BRIEF IN ANSWER TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

Because the Brief of the Government in opposition seeks to sustain the convictions upon grounds other than those stated by the Court of Appeals, and thereby to circumvent certain conflicts with this Court and with other Courts of Appeals, Petitioners consider it appropriate to file a Brief in reply.

Petitioners' contention that the admission into evidence against absent co-conspirators of acts and declarations of one conspirator after the termination of the conspiracy conflicts with the holding of this Court in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), is met with the answer that the conspiracy did not terminate. The Government

thus ignores the holding of the Court of Appeals "that the conduct of the parties and their statements after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married" (R. 399).

Petitioners' contention that the holding of the Court of Appeal that wives are competent to testify against their husbands in federal criminal cases is in conflict with applicable decisions of this Court and with decisions of the Courts of Appeals for the Second, Third, and Sixth Circuits, is disposed of with the observation that "the question is not here posed for decision, since the trial judge, upon the state of the record, had no wife before him nor even prima facie evidence of a marriage" (Gov't Bf., p. 23).

Finally, Petitioners' contention that the holdings of the Court of Appeals with respect to the Government's failure to prove that the marriages were void under French law conflicts with decisions of this Court and with the Courts of Appeals for the Second, Third, Sixth, and Ninth Circuits, is given no real answer at all. The Government merely says: "Petitioners, and in some degree the court below, have obscured the issues. * * * These questions are not reached" (Gov't Bf., pp. 25-26).

In other words, according to the Government, each of the main issues discussed and decided by the Court of Appeals, and raised by the Petition for a Writ of Certiorari, either does not exist, "is not here posed for decision," or "is not reached." The Brief for the United States in Opposition, therefore, may well be taken as an admission that, if these questions do exist and are posed, the decision of the Court below is in conflict with decisions

of Courts of Appeals for other Circuits and with decisions of this Court. The Government has thus gone far toward recognizing that this is a proper case for a Writ of Certiorari.

In order to demonstrate that these questions were properly before the Court below, and thereby to meet the thrust of the Government's arguments, it will be necessary to go to the record and to spell out what was charged in the indictment, what issues were determined by court and jury, and what was decided in the Court of Appeals. Yet even if the Government's position were well taken and reasons other than those expressed by the Court of Appeals justify the result, the fact that the decision below stands in the reports, full of conflicts with this Court and the Courts of Appeals for other Circuits, requires that there here be some resolution of these conflicts.

I.

The indictment charges the defendants with conspiring to commit the "offenses against the United States * * * set forth and described in Counts Two to Six, inclusive, of this indictment * * * and to defraud the United States of and concerning its governmental function and right of administering the immigration laws of the United States * * * free from fraud, deceit, misrepresentation * * *" (R. 4-5).

The indictment also charges that "It was further a part of the said conspiracy that * * * after the aforesaid ostensible marriages had served their purposes to secure the entry of the * * * [aliens] into the United States for permanent residence as non-quota immigrants under Section 232, Title 8, United States Code, the parties to the aforesaid ostensible marriages would not live together in the United States as man and wife and thereafter would

take such legal steps to sever the formal bonds of said ostensible marriages as they saw fit" (R. 6-7).

And finally the indictment charges: "It was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid * * *" (R. 7).

The offenses against the United States charged in Counts Two to Six involve false statements under oath, misrepresentations, or omissions in applications for admission to the United States filed at the Office of the United States Immigration and Naturalization Service at the Port of New York prior to, and as a prerequisite to, entry into the United States.

Clearly the crimes charged in the substantive counts all occurred prior to the time the aliens were permitted to enter the United States. Hence the conspiracy to commit the offenses against the United States charged in the substantive counts terminated with the entries. The Government takes the position, however, that the conspiracy to defraud the United States continued so long as the defendants concealed their acts from the Immigration and Naturalization Service and so long as the parties to the marriages remained undivorced. Thus a conspiracy without end is postulated, since two of the three marriages are still not dissolved.

Moreover, it is apparent that the reasons for rejecting an implied conspiracy to conceal in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), are also applicable here, even though the Government relies upon the fact that the subsidiary conspiracy to conceal is charged in this indictment. The Court's opinion in the *Krulewitch* case, at page 444, points out that under the rule proposed by the Government "plausible arguments could generally be made

in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators." Thus this Court refused to adopt a theory "which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence." In addition, Mr. Justice Jackson, in his concurring opinion in *Krulewitch*, at pages 456-57, rejected the Government's position because it would extend the statute of limitations and create a new judge-made crime.

These views are equally applicable to the present indictment. The charges with respect to living separately and obtaining divorces after entry and with respect to concealment do not charge substantive statutory crimes. Nor has it ever been held to be a fraud upon the United States to conspire to conceal a conspiracy or for husbands and wives to live separate and apart and to obtain divorces.

In addition to these reasons for refusing artificially to extend the duration of the conspiracy beyond the dates of entry, there is the persuasive fact that the record is devoid of evidence to support the charges that the defendants conspired either to conceal their acts, to live separate and apart, or to obtain divorces. A conspiracy terminates when concerted action is no longer necessary to effectuate its purposes. *Fiswick* v. *United States*, 329 U. S. 211, 216 (1946); *Logan* v. *United States*, 144 U. S. 263, 322-23 (1892). Here the record is clear that whatever steps were taken toward divorce were individual rather than concerted. The record is also clear that the defendants apparently talked to anyone and everyone about their activities, thus doing the very opposite of attempting to conceal. In fact, almost the entire testimony of Government witnesses Ludmer and Haberman consisted of conversations with the defendants in which the defendants narrated past events with respect to the circumstances of the marriages and the entries into the United States.

The Government complains that, in any event, the Petitioners have not specified a single instance in which acts or declarations were admitted against all defendants after the termination of the conspiracy (Gov't Bf., p. 22, fn. 14). As a matter of fact, testimony of this type constituted a significant part of the Government's case, including: (1) The fact that Maria Lutwak and Munio Knoll lived together after they entered the United States although married respectively to Marcel Lutwak and Bessie Osborne. This evidence also included testimony indicating that Maria Lutwak did not live with Marcel Lutwak and that Bessie Osborne did not live with Munio Knoll (Haberman, R. 28; Wicker, R. 140-143). The prejudice arising from such testimony became even greater when the court admitted against all defendants the testimony of witness Ludmer that he saw Marcel Lutwak with a plaster cast on his arm (R. 98) the day after Marcel Lutwak was supposed to have jumped out of a window. This is so because testimony had previously been admitted against Munio Knoll alone to the effect that this incident arose because Munio found Marcel in bed with Maria. (2) Testimony that Grace Klemtner Knoll did not live with Leopold Knoll after their entry into this country (Turner, R. 135-137, Grace Klemtner Knoll, R. 250-260). (3) Testimony as to Munio Knoll's request of Bessie Osborne that she withhold obtaining a divorce from him (Osborne, R. 208-209). (4) Photographs of certain of the defendants in night clubs which were admitted against all defendants (Haberman, R. 287). (5) Testimony indicating that Munio Knoll had told various people in New York that it was very easy to secure entry into this country if you had money and knew how (Haberman, R. 152-160).

Irrespective of the termination of the conspiracy, much of this evidence was not properly admitted against all defendants because not in furtherance of the conspiracy.

Just how did Munio Knoll's going with Maria to night clubs in New York and Chicago, together with friends, where their pictures were taken, in any way further the conspiracy? Yet Government Exhibits 22, 23, 24 and 25, consisting of such highly prejudicial photographs, were admitted against all the defendants (R. 287). And how did Munio Knoll's boast that it was easy to get into the country aid in the carrying out of the conspiracy?

II.

1. The treatment by the trial court, the Court of Appeals, and the Government, here and below, of the issue as to the competence of a wife to testify against her husband in a criminal case is marked by very real confusion. When the defendants initially challenged the competence of one of the wives, the Assistant United States Attorney took the position that under the principles of *Funk* v. *United States*, 290 U. S. 371 (1933), the wife was competent. This was likewise the impression of the trial court (R. 44, 46-48). After argument, however, the trial court made no such ruling. Rather, with respect to the witness Maria, it avoided ruling directly on the question (R. 51-52 and 56-57), and with respect to witness Bessie Osborne, it ruled that there was sufficient evidence to raise an issue of fact whether or not she was the wife of defendant Munio Knoll; consequently the witness was permitted to testify (R. 187).

The Court of Appeals, in its original opinion, approved what the trial court had done, and stated expressly that, since the jury by its verdict established that the marriages were invalid, the wives were competent. On this view it was proper for the jury to pass upon the question because the validity of the marriages had been controverted (R. 397-98).

In petitioning for rehearing the defendants once again argued the case of *Miles* v. *United States*, 103 U. S. 304 (1881), which the Court of Appeals had not mentioned, and which stands for the proposition that a witness cannot testify before the jury as to the very issue that must be proved to establish that witness' competence. Apparently because of the vigor of this argument, and because the question of the wives' competence "is of such importance in the law of evidence" (R. 405), the Court of Appeals, in its opinion on rehearing, launched into a lengthy discussion of the subject, concluding that under the doctrine of *Funk* v. *United States* and Rule 26 of the Rules of Criminal Procedure, "the wives were competent witnesses" (R. 405-13).

Only after so holding, however, did the Court of Appeals reaffirm its original conclusion that it was proper to permit the wives to testify in view of the prima facie showing in the record that the marriages were invalid (R. 413). The Court announced that "this rule we think is in accord with authoritative decisions," but it did not cite any cases and did not discuss or mention *Miles* v. *United States*, 103 U. S. 304 (1881).

The Government, in its Brief in opposition, declines to be drawn into a discussion of the second Court of Appeals' opinion, stating flatly that the question of the competence of a wife to testify against her husband "is not here posed for decision, since the trial judge, upon the state of the record, had no wife before him nor even prima facie evidence of a marriage" (Gov't Bf., p. 23). Yet even this contention is not consistent with the Court of Appeals' alternative view, according to which it was proper for the jury to pass upon the validity of the marriages and to hear the wives' testimony respecting those marriages *on the basis of the prima facie showing of invalidity* (R. 413).

The Government then attempts, albeit in a footnote, to dispose of *Miles* v. *United States*, 103 U. S. 304 (1881).

In urging that this Court not grant a Writ of Certiorari, the Government is thus asking that the opinions of the Court of Appeals be allowed to stand unreviewed, even though in endeavoring to justify them the Government recognizes that, to say the least, they are confused. In fact, the Government's Brief conclusively demonstrates that the Court of Appeals can be supported, if at all, only by arguments different from and inconsistent with those employed by that Court.

2. What is more, with respect to an important issue of fact the Government now takes a position different from that taken by the prosecution below and by the Court of Appeals. The Government now asserts that it was a serious question whether Munio Knöll ever obtained a valid divorce from Maria (Gov't Bf., p. 24). Quite obviously, if Munio had not been validly divorced he lacked the capacity to remarry. Yet the Government has blown hot and cold on this issue from the very beginning.

In his opening statement, the Assistant United States Attorney advised the jury that the evidence would show that Munio Knöll and Maria obtained "during the war, what is known as a rabbinical divorce in Budapest" (R. 23). When questioning Maria, however, the prosecutor carefully avoided asking any questions concerning such a divorce, and then successfully objected to any cross-examination with respect to it (R. 73). During the argument as to the competence of Maria to testify, the Assistant United States Attorney stated to the court that according to his information a rabbinical divorce was not recognized in Hungary as a civil divorce (R. 42-43). Nonetheless he declined to indicate whether or not the Government contended that Munio and Maria were never validly divorced

United States, 103 U. S. 304 (1881), on the ground that it applies only to instances where the witness is *prima facie* incompetent. Here, the Government appears to assert, the evidence was such that the wives were *prima facie* competent. But this attempted distinction overlooks the fact that the question of *prima facie* competence or incompetence depends, not simply upon the evidence as of the time the witness is offered, but upon the status of the witness. Thus a wife, *qua* wife, is *prima facie* incompetent. Even when the evidence tends to show that the wife is not a legal wife, but is, for example, a bigamous wife, she is competent for certain purposes only, and she cannot testify before the jury as to the very issue which must be proved to establish her competence as a witness. This is the unqualified ruling of *Miles* v. *United States*, 103 U. S. 304 (1881).

The applicability of the *Miles* decision to the present case is readily apparent. Count 1, in essence, charges a conspiracy to arrange ostensible marriages for the purpose of bringing aliens into the United States under the so-called War Brides Act. In order to sustain its burden the Government was required to prove that such was in fact the sole purpose of the marriages, and that they were therefore not real marriages.

Under the *Miles* case, a wife in a plural or fraudulent or otherwise invalid marriage can testify only when the fact of its plural or fraudulent character is established. But the wife in such a marriage, even when its character is established, cannot testify with respect to the facts tending to show its character, but only with respect to other matters. For, clearly, so long as the facts having to do with the invalid character of the marriage are in dispute, the supposed wife, if she is permitted to testify concerning it, is in effect testifying with regard to her own competence. And such testimony, even where the wife's *prima*

facie incompetence is overcome by independent evidence, is not proper in view of the *Miles* case.

Here the defendants asked for *voir dire* examinations in order that the questions of competence could be determined out of the presence of the jury. The court refused, stating that it would allow the validity of the marriages to be determined by the jury (R. 41, 49, 56-57, 187-88, 224-26). In thereupon permitting the wives to testify with regard to the circumstances of the marriages, the court allowed evidence to go to the jury with respect to the very issues which had to be decided in order to establish wives' competence. Under the *Miles* case this was clearly error.

It will not do to contend, therefore, as the Government does, that at the time Bessie Osborne was permitted to testify "the evidence conclusively showed that her marriage was a sham" (Gov't Bf., p. 25, fn. 16). For, in the *Miles* case, when the second wife testified, the evidence showed that the defendant had a prior wife. According to the Government's argument here, the second wife in *Miles* consequently should have been permitted to testify against the defendant as to all issues, including the issue of the prior undissolved marriage. Yet it was this very testimony of the second wife that constituted error. Plainly, then, Bessie Osborne's testimony in this case, a major portion of which related to the circumstances of her marriage to Munio Knoll (R. 190-210), was error, since her testimony bore both upon the ultimate issue to be decided by the jury and also necessarily upon the issue determinative of her own competence.

Because of the importance of the *Miles* case in connection with this Petition, a more extensive analysis of it is included herein as an Appendix. In doing so, Petitioners wish to point out that the *Miles* decision has not been

adequately considered by the Court of Appeals or by the Government, either below or in this Court. Petitioners submit that it disposes completely of the alternative ground advanced by the Court of Appeals for permitting the wives to testify, which is the only ground relied upon by the Government in opposing the Petition for a Writ of Certiorari.

III.

The Government's answer to Petitioners' contention that the validity of the marriages should have been determined by French law is all but incomprehensible. The only thing that is clear is that the Government once again finds confusion in the Court of Appeals. For the Government's position in this Court is that the questions as to foreign law "are not reached" (Gov't. Bf., p. 26).

The argument appears to be that whether or not the parties were validly married under French law is immaterial, since the crime they were charged with was that of conspiring to create "only an outward appearance of marriage" (Gov't Bf., p. 26). If the defendants actually created valid marriages under French law, according to the Government, therefore, they did so in spite of their purpose and more or less by accident, so to speak. At most, then, such a result would have been a "slip-up" on the part of the conspirators.

The difficulty with this argument is that it overlooks completely what the indictment and trial were all about. For, no matter what the Government would like to make of them in this Court, the indictment and trial, and the argument in the Court of Appeals as well, rested upon the assumption that the Government had to show that the marriages were void in order to obtain convictions. The gist of the substantive counts of the indictment is the charge

that the defendants misrepresented their marital status, *i. e.*, asserted that they were married when in fact they were not (R. 9-14). The whole purport of the instructions as to the meaning of marriage, given to the jury by the trial court, related to the elements making for the validity or invalidity of a marriage (R. 339-40). The original opinion of the Court of Appeals stated that "The contest in the trial court centered largely about these two factual questions, viz., did defendants conspire and, if so, did the Government prove by competent evidence that the marriages were in fact invalid" (R. 392). The opinion also said that "before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify a conclusion that the three marriages were void,—of no legal effect, and that they were so intended, for, if they were valid, the Government cannot complain" (R. 395).

Yet the Government asserts in this Court that whether or not the marriages were invalid is beside the point and that consequently it is unnecessary to decide which law should determine validity or invalidity. In view of what transpired in the trial court and the Court of Appeals, this assertion is, to put it mildly, an audacious one. For not only does it mean, of necessity, that the Court of Appeals and the trial court committed a serious bobble as to what the issues were, but also that the prosecution fumbled the indictment and trial. It suggests rather sharply, moreover, that the Petitioners were never adequately appraised as to the true nature of the charges against them, for, along with the trial court and the Court of Appeals, the Petitioners assumed that one key issue was whether the marriages were valid or not. Although this switch in position by the Government, and its abandonment of virtually everything the Court of Appeals had to say in affirming, may not constitute fatal variance,

at the very least it indicates that the Petitioners were convicted of conspiring to commit an offense, which, chameleon-like, changes its complexion from Government Brief to Government Brief and from court to court.

In consequence, this Court is faced with the following anomalous situation: *the Government—in asserting that the decision below is correct, according to which the Government had to prove the marriages invalid and could not complain if they were in fact valid—says that it was not incumbent upon the Government to prove that the marriages were invalid, since even if the marriages be valid the defendants were guilty!*

Conclusion.

The Petitioners were convicted of conspiracy. Yet, as has been indicated above, just what the Petitioners conspired to do is very hard to articulate, for with respect to what appears to be the heart of the indictment, the charge as to "ostensible" marriages, the Government and the Court of Appeals are in disagreement. Was the Government obliged to prove that the marriages were invalid? The Court of Appeals says yes. But the Government, in this Court, says no. Plainly, such imprecision, such apparent confusion, such a lack of consistency in legal argument, all in support of criminal convictions, are matters for grave concern, and particularly where, as here, those qualities permeate every phase of the case in every court.

The liberty of three persons is at stake—and with them, vital questions respecting the admissibility of evidence and the requirements of proof in conspiracy trials. Petitioners therefore renew their prayer that this Court grant its writ of Certiorari.

Respectfully submitted,

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APPENDIX.

Miles v. United States, 103 U. S. 304 (1881).

The *Miles* case began as a prosecution for bigamy in the Territory of Utah. At the trial, after admitting declarations by the defendant to the effect that one Emily Spencer was his first wife, the prosecution offered as a witness Caroline Owens, the wife with whom the defendant was accused of having contracted a polygamous marriage. At that point the defendant admitted that he had married Caroline Owens and offered testimony to prove it, which proof the court rejected. The defendant therefore objected to the introduction of Caroline Owens as a witness on the ground that, being his wife, she was incompetent to testify against him. This objection was overruled, and the witness Caroline Owens gave testimony tending to prove the marriage of the defendant to Emily Spencer prior to his marriage to the witness.

In its charge to the jury the court stated:

> A legal wife cannot, but when it appears in a case that the witness is not a legal wife but a bigamous or plural wife then she may, testify against the bigamous husband, and her testimony should have just as much weight with the jury as any other witness, if the jury believe her statements to be true.

On writ of error to the Supreme Court of Utah, the United States Supreme Court reversed, holding that the court erred in allowing Caroline Owens, the second wife, to give such evidence, and in instructing the jury that it might consider such testimony. After noting that under Utah law a husband could not be a witness for or against his wife, nor a wife for or against her husband, Mr. Justice Woods wrote for a unanimous Court:

The marriage of the plaintiff in error with Caroline Owens was charged in the indictment and admitted by him upon the trial. The fact of his previous marriage with Emily Spencer was, therefore, the only issue in the case, and that was contested to the end of the trial. Until the fact of the marriage of Emily Spencer with the plaintiff in error was established, Caroline Owens was *prima facie* his wife, and she could not be used as a witness against him.

The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely: the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court on some collateral issue, on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, *in order to establish his competency, and at the same time prove the issue.*

The authorities sustain these views * * * [citing authorities] * * *

The result of the authorities is that, as long as

the fact that the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence, to the satisfaction of the court, the second may be admitted to prove the second marriage, but not the first, and the jury should have been so instructed.

In this case the injunction of the law of Utah, that the wife should not be a witness for or against her husband, was practically ignored by the Court. After some evidence tending to show the marriage of plaintiff in error with Emily Spencer; but that fact being still in controversy, Caroline Owens, the second wife, was put upon the stand and allowed to testify to the first marriage, and the jury were, in effect, told by the court that if, from her evidence and that of other witnesses in the case, they were satisfied of the fact of the first marriage, then they might consider the evidence of Caroline Owens to prove the first marriage.

In other words, *the evidence of a witness, prima facie incompetent and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue and at the same time to establish the competency of the witness.*

In this we think the court erred. (Emphasis added.)

The *Miles* opinion was acknowledged to be the law in a recent case by the Court of Appeals for the District of Columbia, *Matz* v. *United States*, 158 F. 2d 190 (App. D. C. 1946).